

LABUAN WOOD PRODUCTS SDN. BHD.

a

v.

MALAYSIA NATIONAL INSURANCE SDN. BHD.

HIGH COURT BORNEO, SABAH

SYED AHMAD IDID JC

[ORIGINATING SUMMONS NO. K74 1989]

b

16 JANUARY 1991

ARBITRATION: Notice to appoint arbitrator - Time specified - Undue hardships - Extension of time - Arbitration Act 1952, s. 28.

INSURANCE: Clause as to time within which insured should provide particulars to insured - Exclusions - Failure to refer to arbitration.

c

On 5 November 1987, plaintiffs, L insured with the defendants MNI, all the said properties, up to a sum of RM5 million. By payment of an additional premium, MNI agreed that notwithstanding condition No. 6, the insurance would cover loss or damage by fire resulting from earthquake, hurricane, cyclone, typhoon and windstorm.

d

On 10 November 1987, a large section of the roof of the factory at the sawmill complex was ripped off and damaged by wind during a storm whereby the interior of the factory was exposed. As a result of investigation by the adjusters appointed by MNI, on 22 January 1988 MNI offered BB, as chargee of L, a sum of RM15,100 as settlement of L's claim on the policy.

e

Prior to MNI's offer, on a request by the adjusters for particulars, L's liquidator furnished the adjusters with the particulars except for the layout plan of the factory.

On 24 February 1988, the liquidator advised MNI of further damage to the building, machinery and claimed RM596,900 for the damaged machinery and equipment. MNI replied that any claim for subsequent damage was excluded by conditions 11 and 4 of the policy and was restricted to damage to the factory only.

f

Clause 11 of the policy provides that insured shall within 15 days of the loss of damage, deliver to the insurer a claim in writing for the loss and damage containing an amount of all the items of property damaged or destroyed and the amount of loss.

L applied for an order of extension of 15 days in clause 11 from date of order and extension of 30 days from date of order for notice to appoint an arbitrator for arbitration proceedings in respect of L's claims for damages under the insurance policy.

g

The issues for the Court were:

- (a) whether it should exercise its power and discretion under s. 28 of the Arbitration Act 1952 (the Act) to extend time and whether hardships would be caused to L if extension of time is not granted.

h

i

- a** (b) whether L's claim is barred by the various conditions of the policy and if so, whether L would suffer hardship if they are precluded from maintaining their claims against the defendants.
- (c) whether this is a fit and proper case for the exercise of the Court's discretion under s. 28 of the Act for extension of time of concurrence of the action.

b Held:

[1] In considering whether the Court should exercise its power under s. 28, the Court must take into consideration all the relevant circumstances

- (a) the degree of blameworthiness of the claimants in failing to appoint an arbitrator within the time period specified;
- c** (b) the amount at stake and the length of the delay;
- (c) whether it was beyond the claimant's control to appoint an arbitrator in time;
- (d) whether the other side has been prejudiced by the delay and whether undue hardship would be caused if time were not extended.

- d** **[2]** (a) L had on 20 July 1988, 10 November 1988 and 30 July 1989 threatened to take legal action if MNI failed to refer the matter to arbitration; therefore, L had 3 months and 22 days to refer the dispute to arbitration;

(b) although they did not, condition 13 as fraudulent or false declaration cannot be invoked as there is no fraud proved;

- e** (c) although L promptly reported the matter to MNI, MNI responded slowly and offered RM15,100 more than 2 months after occurrence of the damage.

[3] Bearing in mind the facts, the arguments of both Counsel and the laws as well as the scope of s. 28 of the Arbitration Act 1952, the interests of justice require that L's application be granted; undue hardship would otherwise be caused if the application is refused.

f *[Order accordingly.]*

Cases referred to:

Liberian Shipping Corporation v. A. King & Sons Ltd. [1967] 1 All ER 934

Safety Insurance Co. Sdn. Bhd. v. Chow Soon Tat [1975] 1 MLJ 193

Legislation referred to:

- g** Arbitration Act 1952, s. 28

Arbitration Act 1950 [UK], s. 27

For the plaintiffs - Philip Lee; M/s. Lee & Aziz Co.

For the defendants - Raymond Wong; M/s. Nicholas Fung Tokuzip & Co.

JUDGMENT

h Syed Ahmad Idid JC:

The plaintiffs applied for an order that:

- (i) The time within which the plaintiffs shall pursuant to clause 11 of the Policy of Insurance No. AFR-51003358 dated 5 November 1987 made between the parties give notice of loss or damage to the properties insured and shall within 15 days
- i**

after the loss or damage deliver to the defendants the particulars stipulated thereto, be extended for 14 days from the date of this order or such period as the honourable Court shall deem fit. **a**

(ii) The time within which the plaintiffs shall give notice to appoint an arbitrator or an arbitrator be appointed and/or such other steps to be taken to commence arbitration proceedings in respect of a claim by the plaintiffs for damages arising under the contract of insurance dated and made between the parties, be extended for 30 days from the date of this order or such period as the honourable Court shall deem fit. **b**

(iii) The costs of and occasioned by this application be costs in the arbitration.

Section 28 of the Arbitration Act 1952 states:

28. Where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given, or an arbitrator is appointed, or some other step to commence arbitration proceedings is taken, within a time fixed by the agreement and a dispute arises to which the agreement applies, the High Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may, on such terms, if any, as the justice of the case may require, but without prejudice to any written law limiting the time for the commencement of arbitration proceedings, extend the time for such period as it thinks proper. **c**
d

Clause 11 of the Policy of Insurance No. AFR-51003358 reads:

On the happening of any loss or damage the insured shall forthwith give notice thereof to the company and shall within 15 days after the loss or damage or such further time as the company may in writing allow in that behalf deliver to the company: **e**

(a) a claim in writing for the loss and damage containing all particulars an account as may be reasonably practicable of all the several articles or items of property damaged or destroyed and of the amount of the loss or damage thereto respectively having regard to their value at the time of the loss or damage not including profit of any kind; **f**

(b) particulars of all other insurances, if any.

The insured shall also at all times at his own expense produce, procure and give to the company all such further particulars plans specifications, books, vouchers, invoices, duplicate or copies thereof documents, proofs and information with respect to the claim and the origin and cause of the fire and the circumstances under which the loss or damage occurred, and any matter touching the liability or the amount of the liability of the company as may be reasonably required by or on behalf of the company together with a declaration on oath or in other legal form of the truth of the claim and of any matters connected therewith. **g**

No claim under this policy shall be payable unless the terms of this condition have been complied with. **h**

The matter came to Court on four occasions and was finally disposed of on 9 October 1990. The plaintiffs were represented by Mr. Philip V.K. Lee while Mr. Raymond K.K. Wong acted for the defendants.

i

- a** The question here is whether this Honourable Court ought to exercise its power and discretion under s. 28 of Arbitration Act 1952 to extend time in the manner sought by the plaintiffs. In coming to this decision, this honourable Court would have to come to an opinion that in the circumstances of the case undue hardship would otherwise be caused, if the extension of time is not granted to the plaintiffs.
- b** (i) Whether, *prima facie*, the plaintiffs' claim or action is barred by the operation of the various conditions of the policy.
- (ii) If so, then whether it would be undue hardship in the circumstances of the case to the plaintiffs to be precluded from maintaining their claims against the defendants.
- c** and whether this is a fit and proper case for this Court to exercise its discretion under s. 28 of the Arbitration Act 1952 to extend the time for commencement of action.
- On 5 November 1987 the plaintiffs insured with the defendants all the properties situated at WDT No. 5, Ranca Ranca Industrial Estate, Labuan Wilayah Persekutuan, more particularly described in the schedule as (i) building of various construction mainly of wooden and concrete walls and roofed with zinc/concrete as sawmill complex; and (ii) on plant and machinery whilst contained therein up to the sum insured of RM5,000,000 from 1 November 1988. The plaintiffs paid the premium of RM26,250 to the defendants together with the stamp duty fee of RM2.
- d**
- e** By the said policy, the risks insured against were extended to include the risks of riot and strike, malicious damage, explosion, earthquake, hurricane, cyclone, typhoon, windstorm and flood to the properties insured.
- In consideration of the payment to the defendants of an additional premium, the defendants agreed that notwithstanding anything stated to the contrary in condition No. 6 of the policy, the insurance covers loss or damage by fire occasioned by or through or in consequence of earthquake, hurricane, cyclone, typhoon and windstorm.
- f**
- On 10 November 1987 at about 7.45 p.m. a large section of the roof of the kiln dryer factory at the sawmill complex was ripped off and damaged by wind during a storm thereby causing the interior of the said kiln dryer factory to be exposed to the intake of rain water through the damaged roof.
- g** Upon being informed by the plaintiffs concerning their property which is located in Ranca Ranca Industrial Estate Labuan, Wilayah Persekutuan, the defendants informed and instructed the firm of M/s. Maphilindo Adjusters and Investigators to investigate into the matters immediately.
- h** On or about 14 November 1987 the adjusters proceeded to interview one of the security guards and caretaker engaged by the plaintiffs at the sawmill complex.
- On or about 17 November 1987, the adjusters wrote to the liquidator of the company requesting for particulars relating to the plaintiffs' claim.
- i**

By letter dated 17 November 1987 the liquidator of the company wrote and furnished the adjusters with the particulars except for the layout plan of the kiln dryer factory. **a**

On 24 November 1987, plaintiffs received a detailed report from the adjusters concerning the property and the report indicated that the only property which was affected by the windstorm was the Kiln Dryer Factory. It appeared that a large section of the zinc roofing sheets had been ripped off. **b**

The defendants took time to write to the plaintiffs and on or about the 22 January 1988 informed Bank Bumiputra Malaysia Berhad by their branch in Kota Kinabalu that they were offering a sum of RM15,100 in settlement of the plaintiffs' claim on the policy.

By letter dated 24 February 1988 the liquidator wrote to the defendants advising them of further damage to the building, machinery and equipment at the said factory and that the plaintiffs would claim for total loss of the properties insured including the damage to equipment and machinery. **c**

By his letter dated 20 July 1988 the liquidator wrote again to the defendants advising them that he was compelled to dispose of the damaged machinery and equipment at a low price and was filing a claim for RM596,900 being the difference between the amount that the equipment would have fetched and the eventual value they were sold. **d**

By letter dated 29 July 1988 the defendants replied to the liquidator and *inter alia* stated that any claim for subsequent damage was excluded by conditions 11 and 4 of the policy. **e**

On or about 10 November 1988 the liquidator after consultation with the agents of Bank Bumiputra Malaysia Berhad, Kota Kinabalu, wrote to the defendants to press for the claim for damages sustained resulting from the lower disposal value of the equipment. **f**

By their letter dated 17 November 1988 the defendants maintained the plaintiffs' claim was restricted to damage to factory only and urged the plaintiffs to accept their offer of RM15,100 for repairs to the damaged roof at the said factory. **g**

On or about 3 July 1989 the plaintiffs through their solicitors M/s. Richard Malanjum & Co., wrote to the defendants requiring to know from the defendants their stance whether to accept the plaintiffs' claim as stated in the liquidators' letter dated 20 July 1988. **h**

On 6 July 1989 the defendants wrote to the plaintiffs' solicitors and advised the latter that their position was as outlined in their letter dated 17 November 1988, viz; *inter alia*, the plaintiffs' claim was restricted to damage to factory only. The defendants further raised the question whether the plaintiffs' claim was barred by conditions 11, 4, 13 and 19 of the policy. **i**

The leading authority seems to be *Safety Insurance Co. Sdn. Bhd. v. Chow Soon Tat* [1975] 1 MLJ 193. Both plaintiffs and defendants cited it but from different parts. Plaintiffs cited (at p. 194):

i

a At p. 940 Salmon LJ in his judgment said:

b That section seems to me to state quite plainly that if, having considered all the circumstances of the case, the Court comes to the conclusion that the hardship imposed by the form of the arbitration clause on the claimant is greater than that which, in justice, he should be called on to bear, the time within which to appoint an arbitrator may be extended by the Court. I do not believe that the Courts are entitled to read words into this section which are not there and which would have the effect of cutting down the power given to the Courts by the plain language of the section itself.

In construing whether the Court should exercise its power under s. 27, Salmon LJ at p. 943 gave the following guidelines:

c I am not prepared to hold that the Court's power under the section should be very rarely exercised. Still less that they should be exercised freely. The question whether those powers should or should not be exercised must turn exclusively on the particular facts of each case in which the question arises.

d In considering this question the Court must take all the relevant circumstances of the case into account: the degree of blameworthiness of the claimants in failing to appoint an arbitrator within the time; the amount at stake, the length of the delay; whether the claimants have been misled, whether through some circumstances beyond their control it was impossible for them to appoint an arbitrator in time. In the last two circumstances which I have mentioned, which do not arise here, it is obvious that normally the power would be exercised; but those are not the only circumstances and they are not, to my mind, necessary circumstances for the exercise of the power to extend time. I do not intend to catalogue the circumstances to be taken into account, but one very important circumstance is whether there is any possibility of the other side having been prejudiced by the delay.

While citing the *Liberian Shipping Corporation v. A. King & Sons Ltd.* [1967] 1 All ER 934.

Counsel for the defendants said:

f The *Safety Insurance Co. Sdn. Bhd. v. Chow Soon Tat* [1975] FC has given a clear cut criteria upon which we can be guided. Mohamed Azmi J (as he then was) touched on the issue of s. 28 of the Arbitration Act 1952 which is in *pari materia* with s. 27 of the English Arbitration Act 1950. His Lordship also touched on the interpretation of 'undue hardship' in which he essentially relied on Lord Denning's judgment in the case of *Liberian Shipping Corpn. v. A. King & Sons Ltd.* [1967] 1 All ER 934.

g Counsel went on to elaborate:

h I believe, My Lord, the last 4 paragraphs of the quotation must be taken in respect and in context of the particular facts of that case rather than reading it *per se* because it may prelude to a different interpretation. In that case (that is *Liberian* case) there were on-going negotiations between the insured and the insurers and after considerable correspondence and meetings with a view of settlement, neither party had appreciated that time to refer the matter to arbitration had passed by a few days (that is 9 days). Indeed after meetings which led to nowhere did the insured realise that time had passed. After the insurers refused to consent to an extension of time, the insured applied to the Court under s. 27 of the Arbitration Act 1950. The Judge held that applying the test as stated earlier 'undue hardship' would be caused if time were not extended because it would mean that the owners (that is the insured) would be deprived of what might be a valid claim of RM33,000 but had it not been a delay of only a few days due to excusable inadvertence.

i

Does this matter involve RM719,400 (revised to RM596,900) or merely RM15,100? Mohd Azmi J (as he then was) in *Safety Insurance Company Sdn. Bhd. v. Chow Soon Tat* [1975] 1 MLJ 193 FC case p. 200 B said:

By any standard the amount at stake was substantial. Notwithstanding the delay in the making of the application, and taking all the circumstances into consideration this was a proper case where the Court should exercise its discretion under s. 28 in favour of the respondent.

The plaintiffs also had on 20 July 1988, 10 November 1988 and 3 July 1989 (refer Exhibit “SBMR8”, “SBMR10” and “SBMR12” respectively) threatened to take legal action if the defendants failed to adhere to their demands also failed to refer the matter to arbitration. In fact, they had about 3 months and 22 days to refer the dispute to arbitration (that is 20 July 1988 to 11 November 1988). Hence, such conduct and acts are not mere excusable inadvertence which might deprive the plaintiffs of a claim of RM596,900 (as quoted in *Liberian* case). Counsel then asserted that the plaintiffs were trying to pull the horse it has already bolted. It was therefore submitted that in the instant case there were more than “a” mistake. There was time and yet the matter was not referred to arbitration though it was clear that the defendants only offered RM15,100.

Taking the facts and the law, any decision against the defendants will only (according to the affidavit-in-opposition of Abdul Manaf Shariff) “unnecessarily embroil the defendants into subsequent proceedings.” For an insurance company, that is a flimsy excuse.

Though plaintiffs had 3 months to refer to arbitration, they did not. However, condition 13 of the policy should not be invoked as there is no fraud proved. Condition 13 reads:

13. If the claim be in any respect fraudulent or if any false declaration be made or used in support thereof or if any fraudulent or devices are used by the insured or anyone acting on his behalf to obtain any benefit under this policy or if the loss or damage be occasioned by the wilful act or with the connivance of the insured or if the claim be made and rejected and action or suit be not commenced within three months after such rejection or (in case of an arbitration taking place in pursuance of the 18th condition of this policy) within three months after the arbitrator or arbitrators or umpire shall have made their award all benefit under this policy shall be forfeited.

The facts of the case are clear to the prompt reporting of the matter by plaintiffs to defendants. It was defendants who were slow in responding. Between the occurrence and the offer of RM15,100 was a lapse of more than two months.

The matter only came to Court on 16 August 1989: the windstorm which damaged the plaintiffs’ property occurred on 10 November 1987. Nearly two years elapsed in between and another year since.

Bearing in mind the facts, the arguments of both Counsel and the laws as well as the scope of s. 28 of the Arbitration Act 1952, the interests of justice require that I grant an order-in terms. The arbitrators will then decide on the damages including the point raised by defendants’ counsel that “the amount would not have been

a increased if the plaintiffs had taken preventive measures to protect the machinery” after the storm on 10 November 1987. I am of the opinion that in the circumstances of the case undue hardship would otherwise be caused if this order is refused. I, therefore, grant the order-in-terms.

b Also found at [1991] 2 CLJ 1004

c

d

e

f

g

h

i